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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO. 235

NORMAN GRADSKY,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Comes now Norman Gradsky, petitioner herein, by and through his undersigned attorney, and respectfully prays that this Honorable Court issue its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on the 11th day of March, 1965, and the order of the same Court on the 9th day of April, 1965, denying Petition for Rehearing.

OPINIONS OF THE COURT BELOW

The judgment of the District Court for the Southern District of Florida was entered on April 17, 1963. It is annexed hereto as Appendix A. The judgment is unreported.

The opinion of the Court of Appeals for the Fifth Circuit affirming the decision of the District Court is reported at *342 F. 2d 426*, and is annexed hereto as Appendix A.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its opinion in this cause on March 11, 1965 (APP A).

An order was entered denying the Petition for Rehearing on April 9, 1965 (APP B). An order was entered extending the time for filing Petition for Writ of Certiorari until June 8, 1965.

Jurisdiction of this Court is invoked under *28 U.S.C. Sec. 1254 (1)*, and the provisions of Rule 19 of the Rules of the Supreme Court of the United States as amended April 12, 1954, and effective July 1, 1954.

THE QUESTIONS PRESENTED

I.

IS THE CONCEDED PERPETRATION OF A FRAUD AGAINST ALLEGED CO-CONSPIRATORS SUFFICIENT TO INVOKE THE DOCTRINE OF VARIANCE BETWEEN THAT PROOF ADDUCED CONCERNING THE SEPARATE SCHEME AND THE INDICTMENT CHARGING A SINGLE OVER-ALL CONSPIRACY.

II.

DOES THE PLAIN ERROR RULE REQUIRE A REVIEW OF THE TRIAL COURT'S FAILURE TO DIRECT

A SEVERANCE WHERE THE EVIDENCE DISCLOSES MULTIPLE CONSPIRACIES.

III.

DOES THE PLAIN ERROR RULE REQUIRE AN APPELLATE COURT TO REVIEW THE ACTION OF THE TRIAL COURT IN SUBMITTING THE INDICTMENT TO THE JURY WITHOUT LIMITING INSTRUCTIONS AS TO THE CHARGES NOT PROVEN.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following Constitutional Provisions, Statutes and Rules are involved in this Petition for Writ of Certiorari.

Constitution of the United States—Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 18—Federal Rules of Criminal Procedure.

Rule 14. Relief from Prejudicial Joinder

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial

together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Rule 52. Harmless Error and Plain Error.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Title 28. Revised Rules of the Supreme Court of the United States.

Rule 19. Considerations governing review on certiorari.

1 (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Title 15—United States Code

Sec. 77q. Fraudulent interstate transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Title 18—United States Code

Sec. 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

Sec. 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, rep-

resentations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 763, amended May 24, 1949, c. 1939, Sec. 34, 63 Stat. 94.

STATEMENT OF THE CASE

Inter City Finance Corporation was a company acquired on October 9, 1958 by Ray Eizenman who became its president. It was staffed by Norman Herman, the husband of Ray Eizenman who served as vice president, and by Bernard Marcus, a business associate of Ray Eizenman, who was secretary of that corporation.

Miracle Loan Company was also owned by Ray Eizenman and incorporated as a subsidiary to Inter City Finance Corporation. Miracle Loan Company was purportedly engaged in the business of making loans to business men as well as small loans to other individuals to finance the purchase of automobiles, trailers and other items.

Petitioner was the sole owner of an automobile company

known as National Auto Brokers. That company, in the sale of automobiles, frequently arranged for automobile paper encumbering the cars, to be given as security for small loans to be made by Miracle Loan Company in order to enable the prospective purchaser to pay for the cars.

It was demonstrated that Harry Hicks, an employee of National Auto Brokers, in arranging for the transfer of the automobile paper in exchange for funds, frequently created fictitious accounts which were transmitted to the Miracle Loan Company. The monies which were transmitted to National Auto Brokers were in fact paid to purchase the collateral on the cars purportedly sold by National Auto Brokers to bona fide customers. On the Appellate level of these proceedings, it was conceded by Petitioner that fictitious paper was actually given to Miracle Loan Company by National Auto Brokers and that any fraud perpetrated was upon Miracle Loan Company.

After the jury retired, a request was made by them for a copy of the indictment. In transmitting the indictment to the jurors, the Court failed to give any limiting instruction indicating that the unproven allegations contained in the indictment should be disregarded. During its charge, the Court had in fact read a paraphrase of the indictment. While trial counsel made no request for such a limitation, it was contended on the Appellate level that failure to give a cautioning instruction was error. The Court of Appeals, however, refused to review the question since it did not consider it to fall within the plain error rule, Rule 52 b.

REASONS FOR GRANTING THE WRIT

It is clear that the gravamen of the indictment was the creation of a scheme to sell high interest bearing notes to

public investors based upon representations made by Inter City Finance Company. The proof established that Ray Eizenman was the sole owner of both Inter City Finance Company and Miracle Loan Company. The proof further established that Norman Gradsky, petitioner herein, was the owner of National Auto Brokers. No evidence showed any relationship between the companies other than the relationship existing from the sale of automobile paper from National Auto Brokers to Miracle Loan Company in exchange for the funds received from that company.

The testimony adduced at trial demonstrated that from the period November, 1958 to April 1959, Harry Hicks, an employee of Norman Gradsky, used fictitious names and addresses in executing loan paper on purported auto purchases. He would subsequently endorse the names of the fictitious borrowers on checks received by National Auto Brokers.

Thus, the proof at trial established both an effort by Inter City Finance Company to market its high interest bearing notes on the basis of representations made to the public and established at the same time the fact that Inter City Finance Company itself was the victim of a scheme in which it paid sizeable monies.

The proof thus disclosed at least two conspiracies alleged to exist by Government witnesses. Assuming that the proof was sufficient, what then was disclosed by the record was a conspiracy involving Inter City Finance Corporation and the public, and a conspiracy involving National Auto Brokers, not with, but against, an Inter City Finance Corporation subsidiary.

Under the rule in *Kotteakos v. U.S., 328 U.S. 774*, the

trial court then had the burden of permitting every defense available to petitioner to be explained to the jury under appropriate instructions. No instruction was given concerning multiple conspiracies. No instruction was given advising the jury that proof of a separate conspiracy did not meet the burden of proving the conspiracy charged in the indictment. The error was compounded by the Appellate Court's failure to consider this problem relating to an essential right solely on the ground that the record had not been preserved at the trial level.

An additional burden is placed upon the trial court where the proof demonstrates not a single conspiracy as charged but a series of smaller independent conspiracies. Under those circumstances, the trial court should have directed severance of the defendants and the offenses, or should have ordered a new trial. See *U.S. v. Goss, 329 Fed. 2d, 18.*

Concededly, the point was not raised on the trial level. The Circuit Court of Appeals, in rejecting consideration of the point, overlooked the fact that Rule 14 of the Federal Rules of Criminal Procedure, almost by definition, recognized the importance and vitality of the question of joinder and misjoinder.

Upon the request of the jury, a copy of the indictment was submitted for their consideration.

At the time of this submission the trial court failed to give any limiting instructions regarding the unproven allegations contained therein. It is clear that no objection was made to the action of the trial court; yet, it is also clear that an effort was made in the Appellate Court to review allegations contained in specific paragraphs of the indictment. In essence, the material contained in the cited paragraphs was

crucial to the description of the scheme that was charged, yet it was also clear that there had been a complete absence of proof with regard to the allegations. In effect, it allowed the Government to sustain a position by allegation, not proof, upon which its entire presentation rested. Here the Court has allowed the indictment to serve in place of an explanation of an offense and the law. It has encouraged the jury to resort to the pleadings to piece out the offense.

There was no attempt to differentiate the allegations of the indictment from the evidence necessary to sustain them. This required the jury to actually resort to the pleadings in order to determine whether or not the facts they found had any relation to the offense charged. See *Sistrunk v. U.S. (5 Cir. 1947), 162 Fed. 188-9; Morris v. U.S. (9 Cir. 1946) 156 Fed. 525, 531.*

It is clear that withdrawal of parts of the indictment unsupported by the evidence would not constitute an amendment of the indictment. *U.S. v. Segelman (D.C. Pa. 1949) 86 Fed. supp. 114, 125.*

It is equally clear that in submitting issues unsupported by the evidence, the trial court committed error. *Mellor v. U.S. (8 Cir. 1947) 160 Fed. 757, 763. Chambliss v. U.S. (8 Cir. 1956), 218 Fed. 154.*

The Government actually enjoyed a windfall of having the jury hear the allegations which as a matter of law they should not consider but which they could not put out of their mind. *(Frankfurter dissent). Delli Paoli v. U.S. 352 U.S. 232, 248.*

Nor does the Court's admonition that the indictment is not evidence give any but illusory protection to the Appellants.

CONCLUSION

For the foregoing reasons this Petition for Certiorari should be granted.

Respectfully submitted,
SIDNEY M. DUBBIN, ESQ.
531 Pan American Bldg.,
West Palm Beach, Florida.
Attorney for Petitioner.

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 20632

LEON GRADSKY and NORMAN GRADSKY,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(March 11, 1965.)

Before TUTTLE, Chief Judge, JONES, Circuit Judge, and GROOMS, District Judge.

PER CURIAM: The principal basis for the appeals of these separate appellants is the contention that the government failed to prove a single conspiracy in which the two brothers were conspirators, and that thus the testimony as to the declarations of the one were improperly considered by the jury as binding on the other. Norman

Gradsky practically concedes on this appeal, as is fully warranted by the record, that he was guilty of a fraudulent scheme in the setting up of National Auto Brokers, which created fictitious automobile accounts which it sold through Miracle Loan Company to Intercity Finance Company, of which Leon Gradsky was manager. He says that there was no proof that his brother, Leon, knew of the fictitious nature of the automobile paper which Intercity Finance Company represented to its "investors" secured their loans to the company. We conclude that the glaring falsity of the representations made by Intercity as to the nature of the investment it was then offering to the public warrants a finding by the jury that there was full knowledge by the general manager of Intercity of the facts which caused these representations by him to be false. There was sufficient nexus between the corporation primarily operated by Norman and that operated by Leon to warrant submission to the jury of the question whether both brothers were consciously engaged in the same fraudulent scheme.

None of the legal points raised by appellants here may be noted because no motion touching on them was made in the trial court. None of them is of such a nature that substantial justice requires this Court's taking cognizance of them under the plain error rule.

The judgments are AFFIRMED.

APPENDIX B

United States Court of Appeals
FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

ROOM 408 - 400 ROYAL ST.
NEW ORLEANS, LA. 70130

April 9, 1968

Re: No. 28088 - Leon Gradsky and Herman Gradsky
-vs- United States of America.

Gentlemen:

You are hereby advised that the court has today entered an order denying the Petition for Rehearing in the above case. No opinion was rendered in connection therewith.

Very truly yours,

Edward W. Wadsworth

EDWARD W. WADSWORTH,
Clerk

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